Kentucky Law Journal

Volume 25 | Issue 4 Article 11

1937

Terminology of the Court of Appeals of Kentucky in Regard to Certain Interests in Realty

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will soon realize their mistake and remedy it at their first opportunity.

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TERMINOLOGY OF THE COURT OF APPEALS OF KENTUCKY IN REGARD TO CERTAIN INTERESTS IN REALTY

The Kentucky court has been rather careless in its use of the terms "reversion" and "reversionary interest". This is illustrated in the recent case of Fayette County Board of Education, et al. v. Bryan, et al.[1] This action instituted under the declaratory judgment act involved the construction of three deeds conveying land to the Board of Education's predecessor in title for school purposes. The first deed after making an absolute conveyance by the granting clause provided, "subject, however to the following trusts and conditions; the said tract of land shall be used only for school purposes, . . . and should the said land ever be used for any other purpose, the title thereto shall at once revert to and be vested in the first party, free from any right or claim of the second party".

The court termed and held the interest of the transferor a vested reversionary right, which she could convey or release to the holder of the defeasable or determinable fee.

The second deed was to the trustees or their successors in office "so long as it is used for a school".

The court said, "This was a specified condition subsequent which created a determinable or qualified fee subject to termination and reversion upon cessation of that use". "There was a remnant of an estate continuing in the grantor which was capable of being transmitted."

The third deed was conveyed to the trustees upon condition that it be used for school purposes, and if said property ever ceases to be used for the purpose of a school, "then said lot of land shall revert to the estate from which it is hereby granted". The court also used the term "reversion" here in referring to the interest of the grantor.

From the authorities it would appear that the term "reversion" is not correctly applicable to the interest of the transferor in either of the above deeds. The correct terminology for the interest of the transferor in each instance is a possibility of reverter.

A reversionary interest has been variously defined as "any future interest left in a transferor or his successor in interest",[2] or "the residue of an estate left in the grantor, to commence in possession after the termination of some particular estate granted out of him".[3] A possibility of reverter arises from a grant so limited that it may last forever, or may terminate on a contingency. It is the possibility

[1] 263 Ky. 61, 91 S. W. (2d) 990 (1936).

[2] Ten. Restat. Law of Prop., Sec. 199B.

[3] 2 Bl. Com. 175; 4 Kent. 354; Frank Fehr Brewing Co. v. Johnston, 97 S. W. 1107, 30 K. L. R. 211 (1906).

of having the fee again which exists in the grantor after the grant of a determinable or qualified fee.[4]

In each of the above deeds, construed by the Kentucky court, until the contingency happened the grantee was vested with the absolute fee to the property and no remnant of an estate continued in the grantor. Technically the language of the court in this case constitutes its own refutation for in effect it holds that as to the first deed a determinable fee was created in the grantee, leaving a vested reversionary interest in the grantor. This is not correct. When the owner of an estate in fee simple transfers an estate in fee simple determinable, the transferor has a possibility of reverter. In other words if the conveyance creates a determinable fee, it can not at the same time leave in the grantor a reversionary interest. The interest of the transferor is a possibility of reverter.[5] This statement is likewise true as to the conveyance of a fee simple subject to a condition subsequent.[6] As to whether a conveyance like that in the first deed creates a determinable fee, or a fee subject to a condition subsequent, the authorities are not agreed. The difference between a determinable fee and fee subject to a condition subsequent is that in the former the fee reverts to the grantor ipso facto on the happening of the contingency, while in the latter the transferor or his successor in interest has the power and privilege of terminating the interest which has been created on the happening of the condition subsequent, but which will continue until this power is exercised.[7]

As to the second deed which conveys the fee "so long as it is used for a school", the court correctly finds this created a determinable fee, but incorrectly terms it a "specified condition subsequent". Technically it is a special limitation which causes the created interest automatically to expire upon the occurrence of the stated event.[8] The court also incorrectly states that "it is well settled that the conveyance of a fee on a condition subsequent creates a possibility of reversion in the grantor or his heirs". It is well settled that it creates a possibility of reverter.[9]

A possibility of reverter and reversion are not synonymous terms. At common law a possibility of reverter was not an estate in land.[10] It was inalienable.[11] Perhaps a good reason for this common law rule is that until the contingency happens the whole title is in the grantee of the determinable fee, or fee subject to a condition subsequent. The

[4] Gray, Perp. (2 ed.), Sec. 13, 30; North v. Graham, 235 Ill. 178; 85 N. E. 267 (1908).

[5] Ten. Restat. Law of Prop., Sec. 199B; 37 L. R. A. 794.

[6] Ten. Restat., Secs. 66a, 22a, 54a, 22.

[7] Notes 5 and 6, *supra*.

[8] Ten. Restat. of Prop., Secs. 22, 22a, 54a.

[9] Notes 4 and 5, *supra*.

[10] Vail v. Long Island R. Co., 106 N. Y. 283, 12 N. E. 607 (1887).

[11] North v. Graham, 235 Ill. 178, 85 N. E. 267 (1908); Edmund Rice v. Worchester Ry. Corp., 12 All. (Mass.) 141 (1866).

grantor had no vested interest to convey, but only a mere possibility of reverter.[12]

It is submitted from the authorities cited that in order to have a reversion the grantor must convey less than his entire interest, and that when a grantor completely parts with a specified interest, creating a fee subject to a condition subsequent, the optional power of the grantor on the happening of the condition to terminate the estate, is regarded as a new creation rather than as a part of the grantor's original interest left in him when the estate was created, and is, therefore, not a reversionary interest but a possibility of reverter. Likewise the creation of a determinable fee does not leave in the grantor a reversionary interest but a possibility of reverter which arises when the special limitation causes the created interest to automatically expire upon the occurrence of the stated event.

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[12] Methodist Protestant Church of Henderson v. Young, 130 N. C. 8, 40 S. E. 691 (1902).